

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN THAT LUONG,

Defendant.

No. CR 96-00094 JSW

**ORDER DEFERRING RULING
ON MOTION FOR DISCOVERY
AND DIRECTING RESPONSE
FROM JURY OFFICE AS TO
AVAILABILITY OF REQUESTED
DISCOVERY**

(Docket No. 2125)

This matter comes before the Court upon consideration of the motion for discovery filed by John That Luong ("Mr. Luong"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument. Accordingly, the Court VACATES the hearing scheduled for February 6, 2014, and it HEREBY DEFERS ruling on Mr. Luong's motion until the motion to vacate is ripe.

BACKGROUND

Mr. Luong was convicted following a jury trial of a substantive violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and other offenses. *See United States v. Luong*, 215 Fed. Appx. 639, 2006 WL 3825384 (9th Cir. Dec. 26, 2006); *United States v. Luong*, 471 F.3d 1107 (9th Cir. 2006). On February 24, 2011, Judge Patel re-sentenced Mr. Luong to a total term of 65 years imprisonment, following remand from the Ninth Circuit.

1 Mr. Luong initially filed his motion to vacate on September 27, 2012 and, after the
2 Court appointed counsel, on November 27, 2013, Mr. Loung, through counsel, filed his
3 amended memorandum of points and authorities in support of his motion to vacate his sentence.
4 Mr.
5 Luong is proceeding only on claims I, III, IX, XI, XII, and XIII, each of which is premised on
6 the allegation that he received ineffective assistance of counsel. (*See* Docket No. 2058,
7 Attachment C at ECF pages 17-18; Docket No. 2082; Docket No. 2124, Amended
8 Memorandum (“Amended MPA”) at 1:9-14.) By way of a separate order to show cause, issued
9 this date, the Court has directed the Government to answer or otherwise respond to each of
10 these claims.

11 Mr. Luong seeks discovery relating to claims I and III, which assert that trial counsel
12 was ineffective because he failed to challenge the grand and petit jury selection procedures in
13 the United States District Court for the Northern District of California. He also seeks discovery
14 on Claim IX, which asserts that counsel was ineffective because he failed to object to the
15 prosecutor’s “pervasive misconduct.” This claim relates, in part, to an individual named Tuan
16 Thanh Nguyen, a.k.a., “Ah Muoi,” who is referenced in wiretap applications as a close associate
17 of Mr. Luong. Mr. Luong asserts that Ah Muoi was, in fact, an undisclosed government
18 informant.

19 ANALYSIS

20 Mr. Luong seeks discovery pursuant to Rule 6 of the Rules Governing Section 2255
21 Proceedings (“Rule 6”). That rule provides, in part, that “[a] judge may, for good cause,
22 authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil
23 Procedure, or in accordance with the practices and principles of law.” Rule 6(a). However, a
24 habeas petitioner is not entitled to discovery as a matter of course. *Bracy v. Gramley*, 520 U.S.
25 899, 904 (1997). Rather, “discovery is available only in the discretion of the court and for
26 good cause shown.” *Sivak v. Henderson*, 658 F.3d 898, 927 (9th Cir. 2011) (quoting *Rich v.*
27 *Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999). Good cause exists “where specific allegations
28 before the court show reason to believe that the petitioner may, if the facts are fully developed,

1 be able to demonstrate that he is ... entitled to relief[.]” *Bracy*, 520 U.S. at 908-09; *Sivak*, 658
2 F.3d at 927.

3 In order to determine whether Mr. Luong has made a showing of good cause, the Court
4 considers the essential elements of his claims. As noted, each of these claims are premised on
5 the allegation that trial or appellate counsel were ineffective. The Sixth Amendment right to
6 counsel guarantees effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686
7 (1984). In order to prevail on a claim for ineffective assistance of counsel, Mr. Luong must
8 establish that counsel’s representation fell below an objective standard of reasonableness.
9 *Strickland*, 466 U.S. at 688. Second, he must show he was prejudiced by counsel’s errors. *Id.*
10 at 694. There must be a reasonable probability that but for counsel’s unprofessional errors, the
11 result of the proceeding would have been different. The Court need not consider one
12 component if there is an insufficient showing of the other. *Id.* at 697.

13 The bulk of Mr. Luong’s discovery requests are most relevant to the second prong of the
14 *Strickland* test. However, as noted, if Mr. Luong is not able to make a sufficient showing that
15 trial or appellate counsel’s performance was deficient, it need not reach the question of
16 prejudice. The Court concludes that it is appropriate to defer ruling on Mr. Luong’s discovery
17 requests until the motion is ripe. At that point, the Court will determine whether Mr. Luong has
18 demonstrated good cause for his requests.

19 The Court notes that with respect to his requests on Claims I and III, the Government
20 argues that the requests are moot, because the materials Mr. Luong requests have been
21 destroyed pursuant to the Guide to Judiciary Policy. The Government, however, offers no
22 factual support for that assertion. Accordingly, the Court HEREBY ORDERS that, by no later
23 than February 28, 2014, a designated representative of the Clerk’s Office or the Jury Service
24 Office, or both if appropriate, shall provide a declaration stating which, if any, of the materials
25 identified by Mr. Luong at page 2, lines 9-21 of his motion for discovery, are available for
26 production.

27 //

28 //

1 The Court makes clear that it is only seeking information about whether these materials
2 would be available for production and not whether they should be produced.

3 **IT IS SO ORDERED.**

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5 Dated: January 27, 2014



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN THAT LUONG,

Case Number: CR96-00094 JSW
CERTIFICATE OF SERVICE

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 24, 2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John That Luong
08838-097
Hazelton
U.S. Penitentiary
Inmate Mail/Parcels
P.O. Box 2000
Bruceton Mills, WV 26525

Dated: January 24, 2014



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk